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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

BRENDA GAIL GOOCHER,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

On Appeal from the Texas Court
of Criminal Appeals

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

QUESTION I. Whether the Texas Court of Criminal Appeals erred in holding former Vernon's Texas Code Annotated, Penal Code, Section 43.23 (a)(1) valid when the same is invalid for vagueness in that it fails to articulate or describe what is patently offensive and thus deprives appellant of her First Amendment right to freedom of speech as guaranteed by the Constitution of the United States?

QUESTION II. Whether the Texas Court of Criminal Appeals erred in holding that the evidence was sufficient to sustain appellant's conviction for commercial exhibition of obscene material when the State's evidence failed to show the whole of the material exhibited?

Question III. Whether the Texas Court of Criminal Appeals erred in holding that the evidence was constitutionally sufficient to

sustain appellant's conviction for commercial exhibition of obscene material?

LIST OF PARTIES

1. Brenda Gail Goocher, Appellant
2. The State of Texas, Appellee
3. Ercilia Acevedo, Henry Allen Bauldwin, Jr., and Armando Acevedo, Sr. were co-defendants below; however, their cases were disposed of in a separate opinion by the Texas Court of Criminal Appeals (See Appendix (B) p. B-1)

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OPINIONS BELOW

The Texas Court of Criminal Appeals affirmed the judgment of the County Court of Johnson County, Texas, convicting appellant of the misdemeanor offense of commercial exhibition of obscene material. The opinion as yet unreported appears in Appendix A, infra, pp. A-1 through A-22.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

This proceeding is an Appeal from Texas Court of Criminal Appeals which affirmed the judgment of the County Court of Johnson County, Texas, convicting the appellant of commercial exhibition of obscene material. The opinion of the Court of Criminal Appeals was delivered on March 10, 1982. Thereafter, on March 25, 1982, appellant filed a Motion for Leave to File and Motion for Rehearing

En Banc. Leave to File for a Motion for Rehearing En Banc was denied on April 14, 1982. Notice of appeal was filed in the Texas Court of Criminal Appeals on the 29th day of April, 1982.

This Appeal presents three questions for the Court's consideration. The first question concerns whether V.T.C.A., Penal Code, Section 43.23 (a) (1) as was in effect at the time appellant's trial is invalid for vagueness in that it fails to articulate or describe what is patently offensive and thus deprives appellant of her first Amendment right to free speech as guaranteed by the Constitution of the United States. The Texas Court of Criminal Appeals held the statute to be valid. The Supreme Court of the United States has jurisdiction to hear this question under 28 U.S.C. 1257(2) which provides for appeal from the highest court

of a State when there is drawn into question the validity of a state statute on the ground of its being repugnant to the Constitution and the decision is in favor of its validity.

Appellant acknowledges that the remaining two questions do not fall within a particular statutory provision which will confer jurisdiction on this Court to hear them as an appeal; however, these questions are substantial federal questions which would allow this Court to grant certiorari pursuant to U.S.C. 1257 (3). Specifically, the second question deals with whether the evidence is constitutionally sufficient to sustain an obscenity conviction under the rules set forth by this Court in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L. Ed. 2d 1498 (1957) and Miller v. California, 413 U.S. 15, 93 S.Ct., 2607, 37 L.Ed. 2d 419 (1963) when the whole of the material exhibited by appellant was not admitted into

evidence. The third question asks whether appellant was denied due process when the evidence was constitutionally insufficient under the test set out in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed.2d 560 (1979) to sustain a criminal conviction.

Appellant would urge the Court to hear questions two and three along with her appeal of the first question set out above, or to regard them as an appeal improvidently taken under 28 U.S.C. 2103 and to consider them as a petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

Amendment I to the Constitution of the United States reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV, Section 1, to the Constitution of the United States reads:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case is an appeal from a conviction for the offense of commercially exhibiting obscene materials under former V.T.C.A. Penal Code, Sec. 43.23 (a)(1). On December 5, 1977, Deputy Sheriff D. J. Moulder attended a showing at the Trail Drive-In in Johnson County, Texas, where the movies "Cherry Truckers," "Fulfillment," and an unnamed film were playing. Moulder purchased a ticket from appellant, entered the theater,

watched all three films and later procured a search warrant for the theater and arrest warrants for all employees of the theater. The next day armed with these warrants Moulder and others returned to the theater and executed the warrants by arresting appellant, the cook, the popcorn girl, and a poor man who was standing near the projection booth waiting for his wife to get off work.

All four defendants were charged with the offense of commercially exhibiting obscene materials. Prior to the trial appellant filed a Motion to Quash or Set Aside (Tr. 149-152) the information on the basis that the same was void because it was based on V.T.C.A. Penal Code Article 43.21 and Article 43.23 which are void for failing to depict or describe what is patently offensive and therefore deprives appellant of her First Amendment right to freedom of speech under the First and Fourteenth Amendments of

the Constitution of the United States. This motion was presented to the trial judge who overruled the motion (Tr. 159).

Thereafter, the case was tried before a jury. The films "Cherry Truckers" and "Fulfillment" were shown to the jury. The third unnamed film was never shown to the jury although it was shown as a part of one continuous sequence with the other films (S.F. 101, 102, 103) and Deputy Moulder paid only one fee to see all three films (S.F. 101). Appellant objected to the admission of the films into evidence on the basis that they did not constitute the whole of the material shown (S.F. 103). The objection was overruled (S.F. 104). Thereafter, appellant requested that the jury be instructed to disregard and moved for a mistrial (S.F. 104). Both the request and the motion were denied (S.F. 104,105). After the State rested, appellant moved for an instructed verdict on the basis that the whole of the material had

not been introduced into evidence and exhibited to the jury (S.F. 130,131). The motion was overruled by the the Court (S.F. 134).

The case was submitted to the jury which found appellant and her co-defendants guilty. The jury assessed appellant's sentence at 180 days probation and a $200.00 fine. Appellant and her co-defendants gave notice of appeal to the Texas Court of Criminal Appeals (Tr. 183). Questions I and II, supra, were raised as Grounds of Error in the joint brief filed by appellant and her co-defendants. In affirming the appellant's conviction the Texas Court overruled these Grounds of Error stating briefly that showing two of the three movies was sufficient to constitute a whole of the material under the facts, and that it was unnecessary for the Texas Penal Code to define when sexual conduct became "patently offensive." See Appendix A, pp. A-16-A-22.

The Texas Court of Criminal Appeals reversed the convictions of the other three co-defendants on its own motion holding the evidence to be constitutionally insufficient to show guilt beyond a reasonable doubt. See Appendix B. p.14.

Appellant thereafter raised Questions I, II, and III, supra in her Motion for Leave to file and Motion for Rehearing En Banc. Leave to File was denied April 14, 1982. Appellant thereafter gave Notice of Appeal to the Supreme Court of the United States on April 29, 1982.

STATEMENT REGARDING WHY THE QUESTIONS REQUIRE PLENARY CONSIDERATION

QUESTION I. Whether the Texas Court of Criminal Appeals erred in holding former Vernon's Texas Code Annotated, Penal Code, Section 43.23 (a)(1) valid when the same is invalid for vagueness in that it fails to articulate or describe what is patently of-

fensive and thus deprives appellant of her First Amendment right to freedom of speech as guaranteed by the Constitution of the United States?

This questions requires consideration for the reason that the former Texas obscenity statute V.T.C.A.,Penal Code, Sec. 43.23 enacted in 1975 was void for vagueness in that it failed to articulate or describe what is patently offensive, therefore depriving appellant of her First Amendment right to freedom of speech under the Constitution of the United States. The Texas legislature has by implication agreed with appellant's position when in 1979 it amended Section 43.21 to define the term "patently offensive" in terms of "affronting community standards." It should also be noted that the prior Texas obscenity statute also defined the term "patently offensive." V.T.C.A. Penal Code, Sec. 43.21 (1973).

This state statute as any state statute regulating obscenity should have been carefully limited. Interstate Circuit Inc. v. Dallas 390 U.S. 676. 88 S.Ct. 1298, 20 L.Ed 2d 225 ( ). The limits which the state must meet are specified in Miller v. California 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed 2d 419 (1973). Any state statute not meeting the requirements of Miller supra would suffer from the vice of vagueness or overbreadth. Under the Miller test basically four conditions must be met before the state statute comes within constitutionally permissible limits:

(1) The conduct depicted or described must be specifically defined by State law; and

(2) The work taken as a whole must appeal to the prurient interest in sex; and

(3) The work must portray sexual conduct in a patently offensive way (emphasis added); and

(4) The work taken as a whole, must lack serious literary, artistic, political, and scientific value.

A statute which does not give notice of what type of sexual conduct is patently offensive fails to inform one of what type of sexual conduct is proscribed. Although the 1975 version of V.T.C.A. Penal Code, 43.21 listed four types of sexual conduct which may be obscene *if* they are patently offensive and *if* they meet the remainder of the *Miller* test, the statute totally failed to state when sexual conduct of the type described became patently offensive. Both the present and the prior Texas obscenity statutes do state when such conduct becomes patently offensive; however, the one under which appellant was convicted fails to do so.

It is appellant's position that a state obscenity statute must depict or describe *when* sexual conduct becomes patently offensive for the statute to pass constitutional muster.

QUESTION II. Whether the Texas Court of Criminal Appeals erred in holding that the evidence was sufficient to sustain appellant's conviction for commercial exhibition of obscene material when the State's evidence failed to show the whole of the material exhibited?

It is appellant's position that both the trial court and the Texas Court of Criminal Appeals departed from the requirement of Miller v. California, supra, which requires that the whole of the material be examined in order for the evidence to be sufficient to sustain an obscenity conviction. This requirement was adopted in V.T.C.A., Penal Code, Sec. 43.21 wherein "obscene" was defined as meaning:

> "(1)...having as a whole a dominant theme that:
>
> (A) appeals to the prurient interest...
>
> (B) depicts or..."

The lower courts have always upheld the principle set forth in Miller, supra, and previously in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed2d 1498 (1957) that isolated excerpts cannot be the basis for a finding of obscenity.

In this particular case three films were shown in a continuous sequence for one fee. The Texas appellate court held that the state could carve from this sequence any one or more of the films and use it as the basis of an obscenity prosecution. The Court considered each film to be a "unit of perception." Appellant acknowledges that a prosecution may be instituted under existing law for each separate unit of perception exhibited; however, it is appellant's position that the Texas Court of Criminal Appeals has taken the "unit of perception" concept and used it to allow prosecution for isolated excerpts from material.

The logical extension of the Texas

Court's holding would be to allow prosecution based on one chapter or one photo in a book or for one scene in a movie or play.

It is appellant's position that in a commercial exhibition of obscene material case that the "whole of the material" or "unit of perception" should and must consist of everything that was exhibited in return for the consideration paid.

QUESTION III. Whether the Texas Court of Criminal Appeals erred in holding that the evidence was constitutionally sufficient to sustain appellant's conviction for commercial exhibition of obscene material?

The Court should examine this question because the evidence offered was not sufficient to sustain appellant's conviction beyond a reasonable doubt. Where the evidence is so insufficient that the constitutional minimum required to satisfy the due process

clause is not met, the conviction of a state court may be set aside, Jackson v. Virginia 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 2d 560 (1979).

Here appellant was charged with aiding in the commercial exhibition of two obscene films. V.T.C.A. Penal Code, Sec. 43.23, provided in relevant part:

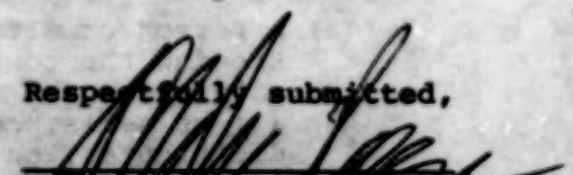
> "(a) A person commits an offense if knowing the content of the material:
> (1) he sells, commercially distributes, commercially exhibits, or possesses for sale or commercial distribution, or commercial exhibition any obscene material."

The only evidence connecting appellant to the crime is that she sold the officer who viewed the movie a ticket. In Smith v. State, 530 S.W. 2d 955 (Tex. Cr. App. 1976) the Texas Court of Criminal Appeals defined the phrase "commercially exhibit" as meaning "to exchange for a valuable consideration." Although appellant took the admission fee at the theater, there is no evidence that ap-

pellant personally received any money or other benefit. There is not any evidence in the State's case-in-chief that appellant had any financial interest in the theater or that she even received any wages.

It is appellant's position that this Court should reverse her conviction and order an acquittal since there is simply no evidence that she commercially exhibited anything.

Respectfully submitted,



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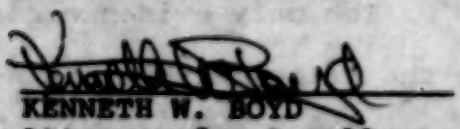

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CERTIFICATE OF SERVICE

We, Michael J. Rogers and Kenneth W. Boyd, hereby certify that three copies of

the Jurisdictional Statement have been mailed by certified mail, return receipt requested, on this 4 day of June 1982, to each of the following:

Dan M. Boulware
County Attorney
Johnson County Courthouse
Cleburne, Texas 76031

State Prosecuting Attorney
P. O. Box 12405
Capitol Station
Austin, Texas 78711.

MARSHALL S. ROGERS

KENNETH W. BOYD

APPENDIX A

Opinion of the Texas Court of Criminal Appeals in No. 60,539, Brenda Gail Goocher, v. The State of Texas

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BRENDA GAIL GOOCHER, Appellant

NO. 60,539 v.---Appeal from JOHNSON County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for the offense of commercially exhibiting obscene materials under former V.T.C.A. Penal Code, Sec. 43.23 (a)(1). The jury assessed punishment at confinement in the county jail for 180 days and a fine of $200.00, but recommended probation.

In appellant's first ground of error she challenges the sufficiency of the evidence to sustain the conviction. Specifically, she complains that the State's

evidence failed to show the whole of the material. A review of the facts is necessary.

Deputy Sheriff D. J. Moulder attended a showing at the Trail Drive-In on the evening of December 5, 1977 in Johnson County where the movies "Cherry Truckers," "Fulfillment," and an unnamed film were playing. Moulder purchased a ticket from appellant, watched all three features and, the following day, consulted with the district attorney regarding institution of criminal charges against the employees of the theater. Moulder procured arrest warrants and a search warrant describing all three films from a Justice of the Peace in Alvarado and again proceeded to the Trail Drive-In; he purchased a ticket for admission from appellant. At some point in the evening while watching the films, Moulder went to the snack bar where he observed two other people, Mrs. Acevedo and Bauldwin, serving

refreshments. After purchasing a hamburger and a Coke, Moulder returned to his car and watched the remainder of the films. After watching all three films, Moulder executed the arrest warrants by taking appellant, Mrs. Acevedo and Bauldwin into custody. In addition Moulder arrested Mr. Acevedo, who was standing in the doorway between the snack bar and the projection room.[1] All three films were confiscated. As part of the presentation of the State's case, the jury viewed "Cherry Truckers" and "Fulfillment."[2]

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[1] Acevedo, appellant and Mr. Armando Acevedo were all arrested. All four were subsequently convicted in a joint trial. The Acevedos and Bauldwin, however, have been treated separately in their appeals. See Cause Nos. 60,536-38, this day decided.

[2] We note in passing that the two films were introduced into evidence without first having been viewed by the court out of the jury's presence to determine the films' admissibility. See Cotlar v. State, 558 S.W. 2d 16 (Tex.Cr.App. 1977).

In appellant's first ground of error, she claims that the evidence is insufficient because the material was not considered as a whole. Appellant asserts that since Moulder paid a single admission price for all three films, the jury should have considered all three films in making its determination of obscenity.

V.T.C.A. Penal Code, Sec. 43.23, provided in relevant part:

> "(a) A person commits an offense if, knowing the content of the material:
>
> (1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition, any obscene material;" 3/

"Obscene" was defined in V.T.C.A. Penal Code, Sec. 43.21 as meaning:

3/ All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.

"(1) ...having as a whole a dominant theme that:

(A) appeals to the prurient interest...;

(B) depicts or describes sexual conduct in a patently offensive way...;

(C) lacks serious literary, artistic, political, or scientific value."

The concept of examining the material as a whole was first enunciated in the Supreme Court's decision of Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957). In Roth, supra, the court finally rejected the concept, stemming from Regina v. Hicklin, [1868] LR.3Q. 360, that obscenity could be judged on the basis of an isolated excerpt from the material.4/

4/ This case stems from an order issued by the Wolverhampton magistrates, pursuant to Lord Campbell's Act, calling for the destruction of 252 copies of an anti-Catholic pamphlet published by Henry Scott entitled The Confessional Unmasked; Showing the Depravity of the Roman Priesthood, the Inequity of the Confessional, and the Questions Put to Females in Confession, since it

Instead, Roth substituted the requirement that material could be obscene if, and only if, the "dominant theme of the material taken as a whole" would appeal to the prurient interest. Although the test for obscenity set forth in Miller v. California, 413 U.S.15, 93 S.Ct. 2607, 37 L Ed 2d 419 (1973), omits the phrase "dominant theme," the "as a whole" concept is retained and it

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wasrather explicit in its recitation of events in the confessional. Scott appealed to Wolverhampton Quarter Sessions, where the recorder, Benjamin Hicklin, reversed the decision on the grounds that although the work was obscene, its publication was an innocent one, in that Scott only desired to promote the objectives of the Protestant Electoral Union. This decision was then appealed to the Queen's Bench. The Court discussed the question of intent and motive at great length, finally deciding that the intent was irrelevant as long as the work itself was obscene. Since obscenity per se had been decided in the earlier proceedings, this disposed of the case, but Lord Chief Justice Cockburn, in dicta, went on to say that obscenity could be decided on the basis of certain passages, not necessarily the entire work. Thus, the test was based upon the effect of certain passages on particularly susceptible individuals, and not the public as a whole.

is clear that the meaning remains the same.

Lower courts have consistently upheld the principle of Roth that isolated excerpts cannot in any way be a basis for a finding of obscenity. Thus, a pattern of seizures by police, admittedly based on "indicators" such as bare breasts or buttocks, has been held to be impermissible, since one objectionable picture cannot render an entire publication obscene.[5/] Similarly, it has been held that since isolated episodes are insufficient, an arrest made on the basis of an offense committedin the presence of an officer requires the officer to have seen the entire motion picture.[6/] Each

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5/ In re Louisiana News Company, 187 F. Supp. 241, 246 (E.D. La. 1960).

6/ Cambist Films Inc.v.Duggan, 298 F. Supp. 1148, 1152, (W.D. Pa. 1969), rev'd on other grounds, 420 F.2d 687 (3rd Cir. 1969); Hosey v. City of Jackson, 309 F.Supp. 527, 534 (S.D.Miss. 1970), vacated on other grounds, 401 U.S. 987 (1971); Hanby v. State, 479 P.2d 486, 493 (Alaska 1970).

motion picture or single book is considered a "unit of perception." This principle applies to trials as well as preliminary proceedings, and thus since a finding of obscenity must be based on the worth as a whole, the judge, or jury must see the entire motion picture or consider the entire book.[7/]

Likewise, in the instant case, the State was only required to present evidence to sustain those allegations contained in the information. The record indicates that the jury viewed "Cherry Truckers" and "Fulfillment" in their entirety, but did not

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7/ Zenith International Film Corp. v. City of Chicago, 291 F.2d 785,789 (7th Cir. 1961); Haldeman v. United Statesm 340 F 2d 59, 62 (10th Cir. 1965); McKinney v. Tuscaloosa, 49 Ala. App. 21, 268 So. 2d 488, 492 (1972); Bryers v. State, 480 S.W. 2d 712, 717-719 (Tex.Cr.App. 1973); Bourland v. State, 502 S.W. 2d 8,9 (Tex.Cr. App. 1973); United States v. West Coast News Co., 228 F.Supp. 171, 178 (W.D. Mich. 1964) aff'd, 357 F.2d 855 (6th Cir. 1966), rev'd on other grounds.

view the untitled film. The State, exercising its right, chose not to charge appellant with commercially exhibiting the third untitled film. As such, the third film was neither relevant nor material to any issue in appellant's trial.[8/]

Appellant's first ground of error is overruled.

In appellant's second ground of error she contends that the trial court erred by denying her a speedy trial under Article 32A.02, V.A.C.C.P. In the instant case, the complaint and information against appellant were executed December 6, 1977. The docket sheets reveals that on June 20, 1978, an announcement of ready for trial was made. On July 12, 1978, a pretrial conference was held at which appellant moved for dismissal

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8/ It is interesting to note that the record indicates appellant was free to introduce the third film into evidence as part of her case-in-chief, but choose not to do so.

for failure of the State to grant them a speedy trial. Appellant's motion was overruled by the trial court.

Article 32A.02, V.A.C.C.P., provides that the court should grant a motion to set aside an information if the State is not ready for trial within 60 days of the commencement of a criminal action and if the defendant is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less.

Appellant contends that since she was charged with the offense of exhibiting commercial obscenity, a Class B misdemeanor punishable by imprisonment for 180 days or less, she was entitled to be brought to trial by the State within 60 days. She argues that the Stated waited 178 days before it announced ready for trial, and 212 days elapsed before the case was actually called to trial. Since appellant claims to

have neither waived her rights to a speedy trial nor moved for a continuance, she claims the State's delay entitles her to a dismissal. We disagree.

The effective date of the Speedy Trial Act was July 1, 1978. In Wade v. State, 572 S.W.2d 533 (Tex.Cr.App.) 1978), the Court held that the time limits prescribed by Article 32A.02, V.A.C.C.P., began to run on July 1, 1978 for all criminal cases then pending on the trial court's docket. Judge Dally, writing for the Court, stated: "In determining whether a motion to set aside an indictment should be granted in cases pending on July 1, the time which elapsed prior to that date is not to be considered." It is clear from the record before us that appellant filed her motion to set aside the information only twelve days after the Speedy Trial Act went into effect. Since the State brought appellant to trial within

24 days, she was not denied her statutory right to a speedy trial.

Ground of error number two is overruled.

Appellant next asserts that the prosecutor made an improper jury argument She says the prosecutor attempted to inject a fact not in evidence. During the State's closing argument at the guilt stage of the trial, the prosecutor made the following comment:

> "Where are the owners? The owner is in New York, Ladies and Gentlemen."

Appellant objected. The trial court sustained the objection and an instruction to disregard was given. Appellant's motion for mistrial was overruled.

An argument will not constitute reversible error unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute or injects new facts, harmful

to the accused into the trial proceedings. Todd v. State, 598 S.W. 2d 286 (Tex.Cr. App. 1980); Simpkins v. State,590 S.W. 2d 129 (Tex.Cr.App. 1979); Kerns v. State, 550 S.W.2d 91 (Tex.Cr.App. 1977). Certainly the State's informing the jury that the owner of the Trail Drive-In was in New York injected new facts into the trial. While such a statement may constitute error, we cannot say, however, that such error was harmful to appellant. Our reading of the record as a whole reveals that appellant sold admission tickets to Deputy Sheriff D. J. Moulder on both the evening of December 5 and December 6, 1977. In light of appellant having been charged with aiding the commercial exhibition of obscenity under Article 43.23, supra, we do not perceive the prosecutor's argument to have been extreme or manifestly improper. See Little v. State, 567 S.W.2d 502 (Tex.Cr.App. 1978); Taylor v. State, 550 S.W.2d 695 (Tex.Cr.

App. 1977). See also Todd v. State, supra; Hardeman v. State, 552 S.W.2d 433 (Tex.Cr. App. 1977); Mims v. State, 466 S.W.2d 317 (Tex.Cr.App. 1971); Hoover v. State, 449 S. W.2d 60 (Tex.Cr.App. 1969). Cf. Stearn v. State, 487 S.W.2d 734 (Tex.Cr.App. 1972). The sustaining of appellant's objection followed by an instruction to the jury to disregard the prosecutor's comment sufficiently cured the latter error.

Ground of error number three is overruled.

In ground of error number four appellant contends that the prosecutor made an improper jury argument during the punishment phase of the trial. During the State's argument to the jury in the punishment phase of the trial the prosecutor stated:

> "I am asking you to enforce it. I'm asking you to do what needs to be done to send these type of people a message to tell them we're not tolerating this type of behavior in our county."

Appellant objected on the basis that the State was asking the jurors to punish because of what someone in the county thinks should be tolerated. The trial court overruled the objection. Appellant then requested the jury be instructed to disregard and moved for a mistrial. Both the request and the motion were overruled.

The Court has held in the past that an unsworn assertion by the prosecutor, as to the expectation or demands of the community for a particular result constitutes reversible error, and cannot be cured by instruction to the jury to disregard. Bothwell v. State, 500 S.W.2d 128 (Tex.Cr. App. 1973); Pennington v. State, 171 Tex.Cr. R. 130, 345 S.W.2d 527 (1961); Cox v. State, 157 Tex.Cr.R. 134, 247 S.W.2d 262 (1952); Porter v. State, 154 Tex.Cr.R. 252, 226 S.W. 2d 435 (1950).

We conclude the prosecutor's statements here were not an appeal based on un-

proven sentiments of the community, unlike those which the Court has held to be reversible error.[9/] We hold the prosecutor's comments did not constitute reversible error. Compare Bolding v. State, 493 S.W.2d 181 (Tex.Cr.App. 1973); Hendrix v. State, 474 S.W.2d 230 (Tex Cr.App. 1971); Spencer v. State, 466 S.W.2d 749 (Tex.Cr.App. 1971); McDaniel v. State, 461 S.W.2d 603 (Tex.Cr. App. 1970); Perbetshy v. State, 429 S.W.2d 471 (Tex.Cr.App. 1968).

Appellant's fourth ground of error is overruled.

In appellant's fifth and final ground of error she asserts that V.T.C.A. Penal Code, Sec. 43.21(1), is void for vagueness in that it fails to articulate or describe

---

9/ For example, the statement on which Pennington, id., at 528, was reversed was: "The people of Nueces County expect you to put this man away." The State's argument in Cox, 247 at 263, was: "The people of DeSoto are asking the jury to convict this man."

what is patently offensive, thereby depriving appellant of her first amendment right to freedom of speech under the Constitution of the United States.

A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1953), and if it encourages arbitrary and erratic arrests and convictions. Papachristou v. City of Jacksonville, supra; Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Herndon v. Lowrey, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066 (1937).

Since amended, Sec. 43.21, supra, the statute at the time of trial provided in pertinent part:

"In this subchapter:

(1) 'Obscene' means having as a whole a dominant theme that:

(A) appeals to the prurient interest of the average person applying contemporary community standards;

(B) depicts or describes sexual conduct in a patently offensive way; 10/ and

(C) lacks serious literary, artistic, political, or scientific value."

Furthermore, in subsection 6,Sec. 43.21, supra, "sexual conduct" is defined as:

"(A) any contact between any part of the genitals of one person and the mouth or anus of another person;

10/ It is interesting to note that the statute as amended by the Texas legislature in 1973 defined "patently offensive" according to the standards enunciated by the Supreme Court in Roth, supra. In 1975, the Legislature once again amended Sec. 43.21. This time the phrase "patently offensive" was not defined. Legislative history of this amendment indicates it was the Legislature's intent to track the language of the Supreme Court's 1973 decision in Miller, supra. The most recent amendment to Sec. 43.21, supra, was in 1979. The current statute now defines "patently offensive" in terms of "affronting community standards." See V.T.C.A. Penal Code, Sec. 43.21 (a)(4).

(B) any contact between the female sex organ and the male sex organ;

(C) any contact between a person's mouth or genitals and the anus or genitals of an animal or fowl, or

(D) patently offensive representations of masturbation or excretory functions."

Appellant complains not of the four types of sexual conduct listed in Sec. 43.21, supra, but of the statutory requirement that these specified types of conduct be depicted in a patently offensive way. The concept "patently offensive" was not defined in the statute. Therefore, appellant argues that Sec. 43.21 fails to state when sexual conduct of the type described becomes patently offensive.

The statutory definition of "obscenity," Sec. 43.21(1), in both V.A.P.C. (1977), in effect at the time of the instant offense and V.A.P.C. (1979) in effect now, tracks word-for-word the language of the Supreme Court in Miller, supra. Chief Justice

Burger, writing for the Court in Miller, 413 at 37, stated: "... that obscenity is to be determined by applying 'contemporary community standards,'..." Quoting from Roth, supra, the Court in Miller, 413 at 28, n. 10, wrote:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote omitted] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. "...[T]he Constitution does not require impossible standards;' all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices...' United States v. Petrillo, 332 U.S. 1, 7-8, [91 L.Ed 1877, 67 S.Ct. 1538]. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark'... boundaries sufficiently distinct for judges and juries to fairly administer the law... That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense...' Id., at 7 [91 L.Ed. 1877]. See also United States v. Harriss, 347 U.S. 612, 624, n. 15 [98 L.Ed. 989, 74 S.Ct. 808]; Boyce Motor

> Lines, Inc. v. United States, 342, U.S. 337, 340 [96 L.Ed. 367, 72 S.Ct. 329]; United States v. Ragen, 314 U.S. 513, 523-524 [86 L.Ed. 383, 62 S.Ct. 374]; United States v. Wurzbach, 280 U.S. 396 [74 L.Ed. 508, 50 S.Ct. 107]; Hygrade Provision Co. v. Sherman, 266 U.S. 497 [69 L.Ed. 402, 45 S.Ct. 141]; Fox v. Washington, 236 U.S. 273, [59 L.Ed. 573, 35 S.Ct. 383]; Nash v. United States, 229 U.S. 373 [57 L.Ed. 1232, 33 S.Ct. 780]."

In Red Bluff Drive-Inc, Inc. v. Vance, 648 F.2d 1020 (CA5 1981), the Fifth Circuit Court of Appeals recently affirmed the constitutionality of the majority of the current Texas obscenity statute on similar grounds, stating that most of the statute is grounded in language prescribed or approved in prior Supreme Court obscenity decisions.[11/]

We decline to hold that Sec. 43.21(1),

11/ The Fifth Circuit Court of Appeals indicated it was abstaining from an adjudication of three provisions of the statute, Sec. 43.21(a)(4), Sec. 43.21(a)(5) and Sec. 43.23(e) and (f), pending a determination by the State courts of their constitutionality.

supra, was unconstitutionally vague simply because the community is allowed to determine when sexual conduct is patently offensive.

Appellant's fifth ground of error is overruled.

The judgment is affirmed.

CLINTON, Judge

(Delivered March 10, 1982)

BY: Panel 2, 2nd Quarter, 1981, composed of:
John F. Onion, Jr., Presiding Judge
Tom G. Davis, Judge
Sam Houston Clinton, Judge

APPENDIX B

Opinion of the Texas Court of Criminal Appeals in Nos. 60,536, 60,537, 60,538, Ercilia Acevedo, Henry Allen Bauldwin, Jr. and Armanda Acevedo, Sr. v. The State of Texas

---

ERCILIA ACEVEDO, HENRY ALLEN BAULDWIN, JR. & ARMANDO ACEVEDO, SR., Appellants

NOS. 60,536, 60,537 & 60,538 v.--- Appeals from JOHNSON County

THE STATE OF TEXAS, Appellee

O P I N I O N

These appeals are from three convictions for the offense of commercially exhibiting obscene materials under former V.T.C.A, Penal Code, Sec. 43.23(a)(1). The jury assessed punishment in Nos. 60,536 and 60,537 at confinement in the county jail for 180 days and a fine or $200.00, but recommended probation.

Though appellants present some seven grounds of error for our consideration, we need reach but one. In ground of error number seven, there is a challenge to sufficiency of the evidence.[1/]

The question of sufficiency of the evidence to sustain a State criminal conviction implicates the Fourteenth Amendment. Jackson v. Virginia, 443 at 319, n. 12, "announced...the constitutional minimum required to enforce the due process right" to be free from conviction except on proof beyond a reasonable doubt. In Griffin v. State, 614 S.W.2d 155, 159 (Tex.Cr.App.

1/ We feel it should be noted at the outset that a single appellate brief was filed on behalf of all three appellants. The sufficiency of the evidence was raised only as to the evidence to support Mr. Acevedo's conviction. We reach the sufficiency of the evidence to support the convictions of Mrs. Acevedo and Mr. Bauldwin on a constitutional basis. See Jackson v. Virginia, 443 U.S. 307, 99 S.Ct., 2781, 61 L.Ed. 2d 560 (1979).

1981), the Court, quoting Jackson, supra, stated:

> "[T[he critical inquiry on review of sufficiency of the evidence to support a criminal conviction must not be simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Woodby v. INS, 385 U.S. [276] at 282 [87 S.Ct. 483, at 486, 17 L.Ed2d 362].)Emphasis added) Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

As Judge Roberts, writing for the Court in Griffin, supra, stated, a conviction that is obtained event when no rational trier of fact could have found guilt cannot constitutionally stand. Applying this standard to the case before us, we hold the evidence insufficient to support all three verdicts, and reverse the judgments.

Deputy Sheriff D. J. Moulder attended a showing at the Trail Drive-In on the evening of December 5, 1977 in Johnson County where the movies "Cherry Truckers" and "Fulfillment" were playing.[2/] Moulder purchased a ticket, watched both features and, the following day, consulted with the district attorney regarding institution of criminal charges against appellants. Moulder procured arrest warrants and a search warrant from a Justice of the Peace in Alvarado and again proceeded to the Trail Drive-In, and purchased a ticket for admission. At some point in the evening while watching the films, Moulder went to the snack bar where he observed two appellants, Mrs. Acevedo and

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2/ Although three films were seized by Moulder on December 6, 1977, only two films were alleged in the information as having been commercially exhibited.

Bauldwin, serving refreshments.[3] After purchasing a hamburger and coke, Moulder returned to his car and watched the remainder of the films. After watching "Cherry Truckers" and "Fulfillment," Moulder executed the arrest warrants by taking Mrs. Acevedo and Bauldwin into custody. In addition Moulder arrested Mr. Acevedo, who was standing in the doorway between the snack bar and the projection room,[4] and Goocher, who sold the tickets on the evening in question.[5] Both films were confiscated. The jury viewed both films as part of the

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[3] Specifically, Bauldwin prepared hamburgers.

[4] Moulder testified at no time did he observe Mr. Acevedo doing anything other than standing in the doorway; we assume he was an employee.

[5] Goocher's appeal of her conviction obtained in a joint trial with appellants' is treated by separate opinion in Cause No. 60,539.

presentation of the State's case.[6/]

Appellants were charged with the offense of commercially exhibiting two obscene films. V.T.C.A. Penal Code, Sec. 43.23, provided in relevant part:

> "(a) A person commits an offense if, knowing the content of the material:
>
> (1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any obscene material;"

The State seeks to prove appellants' complicity as parties to the offense through V.T.C.A. Penal Code, Sec. 7.02, which provides:

> "(a) A person is criminally responsible for an offense committed by the conduct of another if:

6/ We note in passing that the two films were introduced into evidence without first having been viewed by the court out of the jury's presence to determine the films' admissibility. See Cotlar v. State, 558 S.W. 2d 16 (Tex.Cr.App. 1977).

* * *

(2) acting with intent to promote or assist the commision of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense;"

Under this provision, the State argued each appellant while acting with the intent to promote or assist in commercial exhibition of two obscene films were aiding the others.

In Smith v. State, 530 S.W.2d 955 (Tex.Cr.App. 1976), the Court defined the phrase "commercially exhibit" as meaning "to exchange for valuable consideration. "Valuable consideration," the Court explained, "is not limited to money." Id., at 956. The Court in Smith, however, stopped short of indicating whether Sec. 43.23, supra, proscribed conduct of an employee who has no financial interest in a motion picture theater, wherein he is so employed, other than

his wages received.[7] Because there have not been any cases since the obscenity statutes were revised in 1974[8] on that point we look to additional resources to ascertain whether such an interpretation was intended.

V.T.C.A. Penal Code, Sec. 105, states that provision of the code are to be construed "according to the fair import of their terms, to promote justice and effect

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[7] It is interesting to note that Berg v. State, 599 S.W.2d 802 (Tex.Cr.App. 1980), involved a ticket taker at the same drive-in theater as the one in the instant case. Berg was reversed because the trial court refused to admit into evidence nine magazines and one film offered by the defendant to reflect "contemporary community standards" as that term is used in the statute, thereby obviating the need to interpret the remaining language of the statute.

[8] In 1973, the Texas Legislature created Subchapter B of Chapter 43 to replace former antiobscenity statutes. Again in 1979, the Legislature substantially overhauled the subchapter. Of course we do not intimate any views concerning the 1979 revision.

the objectives of this code.." [9/] Additionally, Sec. 2.01 of the Code Construction Act, art. 5429-b, V.A.T.S., provides that words contained in the penal code are to be construed "according to the rules of grammar and common usage."

A standard dictionary serves as one source from which an interpretation may be ascertained. Webster's Third International Dictionary (1961) defines "exhibit" as "to show or display publicly." In addition, "commercial" is defined as "engaging in work designed for the market." "Assist" means to give support to or aid." Id. And "promote" means "to bring into being (e.g., business enterprise)."

In addition to defining the terms involved, Sec. 3.03 of the Code Construction

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9/ All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.

Act, supra, suggests the Court look to other aids in construing the statute: (1) object sought to be obtained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws upon the same or similar subject; (5) consequences of a particular construction; (6) title, preamble, and emergency provision.

Former Art. 527, Vernon's Ann. P.C. (1925), reveals a legislative determination to provide employees like appellant an affirmative defense to the offense of commercial obscenity. Art. 527, supra, stated:

> "This article shall not apply to persons who may possess or distribute obscene matter or participate in conduct otherwise proscribed by this article when such possession, distribution, or conduct occurs... in the course of employment as a moving picture operator or assistant operator, in a motion picture theater in connection with a motion picture film or show exhibited in said theater if such operator or assistant operator

has no financial interest in the motion picture theater wherein he is so employed other than his usual wages received or owed, or like circumstances of justification where the distribution, or conduct is not limited to the subject matter's appeal to prurient interests."

The legislative history indicates that the purpose of this section, a provision common in substance to the obscenity statutes of several other states, [10/] was to afford a

---

10/ The following statutes provide a specific exemption for the projectionist: CAL. PENAL CODE Sec. 311.2(c) (West 1970 and Supp. 1977); MINN. STAT. ANN. Sec. 617.295 (c) (also for the usher or cashier); NEV. REV. STATE. Sec. 201.254 (also stagehand); N.H. REV. STAT. ANN. Sec. 650.3; N.Y. PENAL CODE Sec. 232.15(2) (McKinney Supp. 1976-1977) (also stage employee, cashier, doorman, usher, stand attendant, porter); OKLA. STAT. ANN. tit. 21, Sec. 1040.53 (also usher, cashier); R.I. GEN LAWS Sec. 11-13-15; S.D. COMPILED LAWS ANN. Sec. 22-24-37(3); UTAH CODE ANN. Sec. 76-10-1208(2); VA. CODE Sec. 18.2-375 (general exemption for non-managers); WASH. REV. CODE ANN. Sec. 9.68.010(2).

The following codes and proposals provide a general exemption for people acting within the scope of their employment: IDAHO CODE Sec. 18-4102(c); LA. REV. STAT. Sec.

defense to some who function merely as employees, while imposing penal sanctions for those whose financial stake in the enterprise dictates that they bear the brunt of criminal responsibility. Acts 1971, 62nd Leg., p. 2723, ch. 887.

We believe "the fair import of [the] terms"[11/] which constitute the gravamen of the offense of exhibition of obscenity as then proscribed by Sec. 43.23(a)(1), supra, compels the conclusion that the conduct denounced does not include that which is merely incidential to the exhibition of obscenity. To say that one who serves concessions at a drive-in theater or one who stands in the general vicinity of the projector, absent a

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14.106(c); MASS. GEN. LAWS ANN. ch. 272, Sec. 32 (West Cum. Supp. 1976-1977); N.J. STAT. ANN. Sec. 2A:115-6 (West Sec. 18.2-375(2); W. VA. CODE Sec. 61-8A-3.

11/ See Sec. 1.05(a), supra.

showing of any other activity on that one's part, is guilty of "acting with intent to promote or assist the commercial exhibition" of two obscene films is to contravene the objectives of the penal code.[12/]

12/ V.T.C.A. Penal Code, Sec. 1.02, states that the provisionsof the code shall be construed to:

"(1) insure public safety...;

(2) give fair warning of what is prohibited and the consequences of the violation;

(3) proscribe penalties that are proportionate to the seriousness of the offenses...;

(4) safeguard conduct that is without guilt from condemnation as criminal;

(5) guide and limit the exercise of official discretion in law enforcement...; and

(6) define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction."

After viewing the evidence in the light most favorable to the prosecution, we conclude that no rational trier of fact could have found that appellants committed the offense of commercial exhibition of obscenity beyond a reasonable doubt. We reverse the the judgments of conviction and reform them to show an acquittal.[13/]

CLINTON, Judge

(Delivered March 10, 1982)

BY: Panel 2, 2nd Quarter, 1981, composed of:

John F. Onion, Jr., Presiding Judge
Tom G. Davis, Judge
Sam Houston Clinton, Judge

13/ The Court's reversal on insufficient evidence obviates the need for us to address appellants' six remaining grounds of error.

APPENDIX C

Notice of Denial of "Leave to File" Motion for Rehearing

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, April 14, 1982

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the Appellant's Motion for Rehearing in Cause No. 60,539 BRENDA GAIL GOOCHER

vs.

THE STATE OF TEXAS, Appellee

Sincerely yours,

THOMAS LOWE, Clerk

APPENDIX D

Notice of Appeal

RECEIVED IN
COURT OF CRIMINAL APPEALS
APR 29 1982
Thomas Lowe, Clerk

NO. 60,539

IN THE

COURT OF CRIMINAL APPEALS

Austin, Texas

BRENDA GAIL GOOCHER,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

On Appeal in Cause 27-78-M

County Court of Johnson

County, Texas

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE

UNITED STATES

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ATTORNEYS FOR APPELLANT

NO. 60,539

IN THE

COURT OF CRIMINAL APPEALS

Austin, Texas

BRENDA GAIL GOOCHER,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

On Appeal in Cause 27-78-M

County Court of Johnson

County, Texas

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE

UNITED STATES

NOTICE OF APPEAL

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Brenda Gail Goocher, appellant, by and through her attorneys of record, hereby gives notice of appeal to the Supreme Court of the United States from the judgment of the Texas Court of Criminal Appeals affirming her conviction for commercial exhibition of obscene material in Number 60,539 before said Court. Said judgment was entered on March 10, 1982, and Appellant's Motion for Leave to File for a Motion for Rehearing en banc was denied April 14, 1982.

Appellant makes this appeal pursuant to 28 United States Code 1257 (2) since the validity of Article 43.23 (a) (1) Vernon's Texas Code Annotated, Penal Code, was questioned on the ground of its being repugnant to the Constitution of the United States, and the decision of the Texas Court of Criminal Appeals was in favor of its validity.

Respectfully submitted,

s/ Kenneth W. Boyd
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CERTIFICATE OF SERVICE

We, Kenneth W. Boyd and Michael J. Rogers, hereby certify that true and correct

copies of the foregoing Notice of Appeal have been mailed to the following persons by certified mail, return receipt requested, on this 28th day of April, 1982:

Dan M. Boulware
County Attorney
Johnson County Courthouse
Cleburne, Texas 76031

State Prosecuting Attorney
P. O. Box 12405
Capitol Station
Austin, Texas 78711.

s/ Kenneth W. Boyd
KENNETH W. BOYD

s/ Michael J. Rogers
MICHAEL J. ROGERS

APPENDIX E

Pertinent parts of V.T.C.A. Penal Code, Sec. 43.21 and 43.23 in Effect in 1977

V.T.C.A., Sec. 43.21, provided in relevant part:

> "In this subchapter:
>
> (1) 'Obscene' means having as a whole a dominant theme that:
>
> (A) appeals to the prurient interest of the average person applying contemporary community standards;
>
> (B) depicts or describes sexual conduct in a patently offensive way; and
>
> (C) lacks serious literary, artistic, political, or scientific value."

V.T.C.A., Sec. 43.23, provided in relevant part:

> "(a) A person commits an offense if knowing the content of the material:
> (1) he sells, commercially distributes, commercially exhibits, or possesses for sale or commercial distribution, or commercial exhibition any obscene material."

Office - Supreme Court, U.S.
FILED
AUG 25 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2244

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

BRENDA GAIL GOOCHER,
Appellant

V.

THE STATE OF TEXAS,
Appellee

On Appeal From The
Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. WHETHER TEXAS PENAL CODE §43.23(a)(1) (VERNON 1977) IS UNCONSTITUTIONALLY VAGUE.

II. WHETHER THE EVIDENCE ADDUCED AT APPELLANT'S TRIAL WAS SUFFICIENT TO SUSTAIN HER CONVICTION FOR COMERCIAL EXHIBITION OF OBSCENE MATERIAL?

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I. THE FORMER DEFINITION OF OBSCENITY IN TEX. PENAL CODE §43.23(a)(1) (VERNON 1977), WAS NOT UNCONSTITUTIONALLY VAGUE 6

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No._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

BRENDA GAIL GOOCHER,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Texas Court of Criminal Appeals.

OPINION BELOW

The written opinion of the Texas Court of Criminal Appeals affirming Appellant's conviction is reproduced as Appendix A to Appellant's Jurisdictional Statement. It is also published as *Goocher v. State*, 633 S.W.2d 860 (Tex.Crim.App.1982).

JURISDICTION

This is an appeal from a judgment entered by the Texas Court of Criminal Appeals on March 10, 1982, affirming Appellant's conviction in Johnson County, Texas, of comercial exhibition of obscene material. Appellant's timely filed motion for rehearing *en banc* was denied by the Court of Criminal Appeals on April 14, 1982. Notice of appeal was filed in the Texas Court of Criminal Appeals on April 29, 1982.

This Court has appellate jurisdiction under 28 U.S.C. §1257(2) to consider Appellant's first question. Appellant raised the issue of the statute's constitutionality in the Texas Court of Criminal Appeals and the decision was in favor of its validity.

Discretionary review of Appellant's second question is proper on writ of certiorari under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.

U.S. CONST. amend. XIV:

> ...nor shall any State deprive any person of life, liberty, or property without due process of law.

§43.21, TEX. PENAL CODE (Vernon 1977):

(1) "Obscene" means having as a whole a dominant theme that:

(A) appeals to the prurient interest of the average person applying contemporary community standards;

(B) depicts or describes sexual conduct in a patently offensive way; and

(C) lacks serious literary, artistic, political, or scientific value.

STATEMENT OF THE CASE

The statement of facts contained in Appellant's Jurisdictional Statement is substantially correct.

MOTION TO DISMISS

I. APPELLANT'S CONSTITUTIONAL CHALLENGE TO FORMER §43.23, TEX. PENAL CODE (VERNON 1977), IS INSUBSTANTIAL.

The Texas obscenity statute under which Appellant was convicted defines[1] obscenity according to a three-part test. Material which describes or depicts certain types of "sexual conduct", which were set out in another part of the statute, is obscene if, in addition to meeting the remainder of the test, such conduct is depicted or described in a "patently offensive" manner. Appellant's claim here, as below, is that her conviction cannot stand because the term "patently offensive" is not defined in the statute, rendering it unconstitutionally vague.

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1. As discussed below, the statute under which Appellant was convicted was substantially amended in 1982.

This question does not merit plenary consideration. First, as discussed below, the 1975 statute clearly met the standards announced by this Court in *Miller v. California*, 413 U.S. 15 (1973), and its enforcement did not violate Appellant's right to free speech or due process of law. Since Appellant's conviction, however, §43.21, which sets out the definition of obscenity, has been amended. The definition of obscenity now requires judges and juries to measure "patently offensive" depiction of sexual conduct according to community standards. TEX. PENAL CODE §43.23 (Vernon Supp. 1982). Thus, the particular infirmity alleged by Appellant has been cured, as Appellant concedes. *See*, Jurisdictional Statement, 12.

The narrow question raised here is not sufficiently important to require briefing and argument. Viewed as a whole, even the 1975 statute arguably required reference to community standards for a decision on offensiveness. *See*, Motion to Affirm, *infra*. In light of the recent amendment making that duty explicit, it is safe to say that the problem will not recur, or lead to arbitrary prosecutions.

II. APPELLANT'S SUFFICIENCY OF THE EVIDENCE QUESTIONS ARE NOT WORTHY OF THIS COURT'S REVIEW.

Appellant acknowledges that the only appealable issue presented concerns the constitutionality of the statute. Jurisdictional Statement, 5. She urges the Court to consider two additional issues pursuant to its certiorari jurisdiction; however, as will be shown, neither question merits discretionary review.

A. The Question whether the introduction of two films was sufficient to sustain Appellant's conviction does not require resolution by this Court.

Appellant complains that the State's introduction of only two out of the three films shown for the entrance fee was insufficient to sustain her conviction, since the law requires the material to be considered as a whole. She argues that the "whole" in this case comprises all three films. Appellant has not, however, demonstrated any reason why this Court of Criminal Appeals' decision is in conflict with the pronouncements of this Court, or that decisions of the Courts of Appeals or other state supreme courts are inconsistent. To the contrary, the cases reviewed by Appellee take the position that, unless there is some unusual connection, each movie is regarded as a discrete work. *See* Motion to Affirm, *infra*.

Moreover, the question of what composes the whole work is a preliminary one, and in the nature of a factual determination. Since there appears to be no confusion regarding the concept that the work must be considered as a whole, it would unjustifiably tax the limited resources of the federal courts to require case by case review of such preliminary determinations at the trial level. Even if it were error to sustain the conviction on the strength of only two films, this Court does not sit to correct individual injustices.[2]

The treatment of the issue by the court below does not appear to raise a substantial constitutional question even as regards Appellant's case. She acknowledges that "a prosecution may be instituted under existing law for each separate unit of perception exhibited..." Jurisdictional Statement, 16. Nevertheless, it is her position that the "unit of perception"

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2. It is doubtful that any injustice resulted in this case. If the third film could have demonstrated some serious literary, artistic, or scientific value under the statute, Appellant presumably would have introduced it herself in rebuttal. She did not. Jurisdictional Statement, A-9, n.8.

concept as applied by the Texas courts may lead to prosecution "for isolated excerpts from material", such as one photo in a book or one scene in a movie. Jurisdictional Statement, 17. It has been held that such parsing of material is unconstitutional. But whether the Court of Criminal Appeals would allow it is purely speculative under the circumstances of this case. Appellant's issue is simply not sufficiently important to justify this Court's exercise of jurisdiction.

B. The question whether the evidence against Appellant was sufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979), is not properly before the Court.

Appellant was convicted of commercial exhibition of obscene material. She now argues that, although the evidence showed that she sold tickets to the films, there was not evidence that she received any benefit. This claim was raised for the first time in a Motion for Leave to File Motion for Rehearing *En Banc*. Jurisdictional Statement, 10, 11, B-2 m.1. Under Texas law, therefore, the issue was waived, *e.g.*, *Cox v. State*, 368 S.W.2d 600 (Tex.Crim.App. 1963). Since the state courts did not have any fair or procedurally proper opportunity to decide the question, this Court should decline to consider it for the first time on a writ of certiorari.

MOTION TO AFFIRM

I. THE FORMER DEFINITION OF OBSCENITY IN TEX. PENAL CODE §43.23(a)(1) (VERNON 1977), WAS NOT UNCONSTITUTIONALLY VAGUE.

Appellant's sole ground for challenging the statute under which she was convicted is that the definition of obscenity failed to specify what was meant by the term "patently offensive", TEX. PENAL CODE §43.21 (Ver-

non 1977), and was therefore unconstitutionaly vague. Thus, she claims, she was deprived of her right to freedom of speech. U.S. CONST., amend I. It is clear, however, that §43.21 was intended to codify the test for obscenity set out by this Court in *Miller v. California*, 413 U.S. 15 (1973), which Appellant recognizes as the controlling authority. Jurisdictional Statement, 13.

The three-part test found in former §43.21 tracks almost exactly the *Miller* holding that the trier of fact must decide "(a) whether the average person, applying contemporary community standards—would find that the work, taken as a whole, appeals to the prurient interest, [citations omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or social value." *Miller*, at 24.

This Court has recognized that obscenity statutes do not lend themselves to precision; due process does not require precision, so long as the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices..." *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947), quoted in *Miller, supra*, at 28, n.10. The *Miller* court was confident that the test expounded there would "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller, supra*, at 27. The mere fact that "patently offensive" was not specifically defined does not render it unconstitutionally vague.

Th definition of obscenity in the statute was explicitly adopted with the intent to conform to the *Miller* test. Jurisdictional Statement, A-18, n.10. *Note, supra*, at 854, 855. Thus the content of the statute and meaning of its terms can be determined with reference to the *Miller* opinion, and later decisions explaining it. *See,*

e.g., Hamling v. United States, 418 U.S. 87 (1974); *Jenkins v. Georgia,* 418 U.S. 153 (1974); *United States v. Various Articles of Obscene Merchandise,* 600 F.2d 394 (2d Cir. 1969).

At any rate, Appellant's complaint with respect to what is patently offensive is very specific. She points out that the statute in effect prior to the version under which she was convicted, and the one currently in effect, "do state when conduct becomes patently offensive" by inserting the "contemporary community standards" language in the same sentence with "patently offensive". Jurisdictional Statement, 14. Her position is that since the 1975 version did not explicitly direct the fact-finder to apply contemporary community standards to the term, it is unconstitutional. This argument is meritless.

As the *Miller* court pointed out, finders of fact have always "been permitted to draw on the standards of the community, guided always by limiting instructions on the law...", (*Miller,* at 30). The Court did not even imply that the jury must be specifically instructed to apply those standards to every substantive term. Additionally, however, it is significant that the reference to community standards was not absent from the test in the 1975 statute, but was only contained in a different part. Since the test is conjunctive, the jury must apply community standards to the whole test, regardless of where it appears.[3]

3. One commentator concerning the new law has pointed out that the re-insertion of the language in the second part of the test, which is where Appellant considers it crucial, probably does not change the meaning of the text. *Note,* 17 Tex.L.Rev. 835, 855 n.114 (1980).

II. THE EVIDENCE ADDUCED AT APPELLANT'S TRIAL WAS CONSTITUTIONALLY SUFFICIENT TO SUPPORT HER CONVICTION.

A. The "unit of perception" rule was properly applied by the court below.

The principle articulated in *Roth v. United States*, 354 U.S. 476 (1957), that allegedly obscene material must be considered as a whole has been consistently followed in Texas and elsewhere. What constitutes the "whole", however, may depend on the circumstances. There has been some discussion regarding when magazines, newspapers, and the like must be considered one unit, but the cases seem to assume that each motion picture is a discrete work. *Penthouse Intern., Ltd v. McAuliffe*, 610 F.2d 1354, 1367 (5th Cir. 1980); *United States v. Christian*, 549 F.2d 1369 (10th Cir. 1977)[prosecution for one obscene film imported with several others]; Jurisdictional Statement, A-7, A-8. No court has ever held that the manner of payment controls this determination.

It is conceivable that two films could be thematically integrated so as to constitute a single unit of perception; however, that is not the case here. Appellant objected to the introduction of the two films shown to the jury. The deputy sheriff who executed the search warrant testified that each of the three films was a complete movie, and not part of one movie. (SF 101)[4] He also testified that different actors played in the different movies, and the story line or subject matter was different in each film. (SF 101, 102) The affidavit on which the warrant was issued corroborates his trial testimony. (Tr. 17-23).

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4. "SF" refers to the statement of facts at trial. "Tr." refers to the transcript.

The State charged Appellant with commercial exhibition of two films. Each was shown to the jury in its entirety. Thus, the evidence was sufficient to sustain her conviction; the content of the third film was not relevant.

B. The evidence was sufficient to establish the elements of the charged offense.

Appellant and her co-defendants were charged with a violation of TEX. PENAL CODE §43.23 (Vernon 1977), which provides in part:

> (a) a person commits an offense if, knowing the content of the material:
>
> (1) he sells,...commercially exhibits, or possesses for sale...or commercial exhibition any obscene;

In *Smith v. State*, 530 S.W.2d 955 (Tex.Crim.App. 1976), the court defined "commercially exhibit" to mean "exhibit in exchange for valuable consideration". *Smith*, at 956. The unrebutted testimony of the deputy sheriff established that he paid four dollars to Appellant in return for admission to the theater, and that the films described in the search warrant were shown. (SF 87,88). While he was watching the films, the sheriff observed Appellant enter the theater more than once. (SF 93). From the place where the sheriff observed Appellant walking, he testified that it would have been "hard to miss" seeing what was on the screen. (SF 95).

Thus, the State proved every element of the offense. It is not clear whether Appellant had an ownership interest in the films or the theater. Such finding, however, is not necessary for conviction. Although the legislative history of the act indicates an intent to exclude some employees from criminal liability (Jurisdic-

tional Statement, B-10-11), neither the legislative history nor the text of the statute makes Appellant immune from prosecution.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellee respectfully prays that this Court dismiss the appeal for want of a substantial federal question or, in the alternative, affirm the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

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